90-1919

No.

Supreme Court, U.S.
FILED
JUN 14 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LAWRENCE S. KRAIN, M.D.,

Petitioner,

v.

JERRY HICKS, TIMES MIRROR CORPORATION, TOM JOHNSON, COUNTY OF ORANGE, et al.; and TED MILLARD, TOM JOHNSON, ALFRED GOODWIN, RONALD REAGAN, EDWARD WALLIN, RODERICK PONATH, et al.; and DONALD SMALLWOOD, LYNN WATERS, KATHLEEN O'LEARY, LUPE TORRES, MAURICE EVANS, CAROLYN ALBERTY, JOHN TROTTER, COUNTY OF ORANGE, KITTY LOVE, MARY LITTRELL, PAUL MAST, ORANGE COUNTY MEDICAL ASSOCIATION, MARK WRAY, et al.; and BRENT SUNDIN, JAMES ALFANO, RICHARD BEACOM, ROBERT FITZGERALD, GERALD O'DONNELL, TIM MILLER, BRAD GATES, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit U.S. Supreme Court 12.2 Case

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the 9th Circuit Court of Appeals err in Case No. 90-55265 by failing to note proper proofs of service on file and in the record, especially since Federal Rule of Civil Procedure 4(g) is applicable?

2. Do *United States v. Ayer*, 857 F.2d 881 (1st Cir. 1988) and *Ruiz Varela v. Sanchez Veloz*, 814 F.2d 825 (2nd Cir. 1987) and *Morse v. Elmire Country Club*, 752 F.2d 35, 39 (2nd Cir.) differ significantly from *Worrell v. B.F. Goodrich*, 845 F.2d 840 (9th Cir.), and should this Court resolve the conflicts in interpretation of Federal Rules of Civil Procedure 4(c) and specify to what extent Federal Express receipts may be accepted as certified mail receipts in the light of world modernization?

3. To what extent does this Court intend to resolve federal circuit conflicts regarding the elements necessary to dismiss a complaint with or without prejudice on the basis of competency of a litigant?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
PRAYER	2
OPINIONS BELOW	2
JURISDICTION	2
PERTINENT CONSTITUTIONAL PROVISIONS	3
STATEMENT OF THE CASE	3
1. Nature Of The Case	3
2. Allegations	5
REASONS FOR GRANTING THE WRIT	6
I.	
THIS COURT SHOULD REMAND TO THE 9TH CIRCUIT TO DETERMINE THAT PROOFS OF SERVICE WERE ON FILE FOR THE DISMISSED LITIGANTS OR A VOLUNTARY APPEARANCE WAS MADE AND CERTIFIED MAIL OR FEDERAL EXPRESS RECEIPTS WERE SUFFICIENT AND AN EVIDENTIARY HEARING SHOULD HAVE BEEN REQUIRED FOR DELIBERATE EVASION FOR SERVICE WAS SHOWN	6

II.

THIS COURT SHOULD RULE AS THE SECOND CIRCUIT, NOT THE NINTH CIRCUIT, DID THAT WHERE THERE IS EVASION OF SERVICE AND RETURN OF THE MAIL RECEIPT (UNACKNOWLEDGED) THAT THIS DOES NOT VOID SERVICE BY MAIL ACKNOWLEDGEMENT 7

III.

THIS COURT SHOULD RESOLVE CONFLICTING FEDERAL CIRCUIT DECISIONS AND RULE THAT A LOWER COURT JUDGE'S DOUBT ABOUT COMPETENCE DOES NOT JUSTIFY DISMISSAL WITH OR WITHOUT PREJUDICE UNTIL SUCH TIME AS A QUALIFIED MENTAL HEALTH PROFESSIONAL CAN RENDER AN OPINION AS TO THE CURRENT NOT PAST COMPETENCY OF A LITIGANT 8

CONCLUSION 10

APPENDIX A1

TABLE OF AUTHORITIES

Cases	PAGE
Cyntje v. Government of Virgin Islands, 95 FRD 430 (DVI 1982 4th Cir.)	9, 10
Gulley v. Mayo Foundation, 886 F.2d 161, 165 (8th Cir. 1989)	7
Krain v. Smallwood et al., 880 F.2d 1119 (9th Cir. 1989)	*passim*
Morse v. Elmire Country Club, 752 F.2d 35, 39 (2nd Cir.)	i, 7
Murphy v. Travelers Insurance Company, 534 F.2d 1155 (1976)	6
Pocahontas First Corporation v. Ventura Planning Group, Inc., 572 F.Supp. 503 (1983)	6
Roberts v. Ohio Casualty Insurance Company, 256 F.2d 35, 39 (5th Cir. 1958)	10
Ruiz Varela v. Sanchez Veloz, 814 F.2d 825 (2nd Cir. 1987)	i, 6, 7
Schlagenhauf v. Holder, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964)	9
United States v. Ayer, 857 F.2d 881 (1st Cir. 1988)	i, 6, 7
Westcott v. United States Fidelity and Guaranty Company, 158 F.2d 20, 22 (4th Cir. 1946)	10
Worrell v. B.F. Goodrich, 845 F.2d 840 (9th Cir. 1988)	i, 7

Constitutional Provisions	
U.S. Const., Amend. V	3, 9
U.S. Const., Amend. XIV	3, 9

Rules and Statutes

California Welfare and Institutions Code 5331 .. 8
Federal Rules of Civil Procedure 4(c) i
Federal Rules of Civil Procedure 4(g) 6
Federal Rules of Civil Procedure 17(c) 9, 10
Federal Rules of Civil Procedure 35(a) 9, 10
Federal Rules of Evidence 201 ..... 7, 9
Illinois Health and Welfare Code
Chapter 8 *et seq.* 8

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LAWRENCE S. KRAIN, M.D.,

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JERRY HICKS, TIMES MIRROR CORPORATION, TOM JOHNSON, COUNTY OF ORANGE, et al.; and TED MILLARD, TOM JOHNSON, ALFRED GOODWIN, RONALD REAGAN, EDWARD WALLIN, RODERICK PONATH, et al.; and DONALD SMALLWOOD, LYNN WATERS, KATHLEEN O'LEARY, LUPE TORRES, MAURICE EVANS, CAROLYN ALBERTY, JOHN TROTTER, COUNTY OF ORANGE, KITTY LOVE, MARY LITTRELL, PAUL MAST, ORANGE COUNTY MEDICAL ASSOCIATION, MARK WRAY, et al.; and BRENT SUNDIN, JAMES ALFANO, RICHARD BEACOM, ROBERT FITZGERALD, GERALD O'DONNELL, TIM MILLER, BRAD GATES, et al.,

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PETITION FOR WRIT OF CERTIORARI

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PRAYER

Petitioner Lawrence S. Krain, M.D., respectfully prays that a writ of certiorari issue to review the judgment and order of the 9th Circuit Court of Appeals in this case on April 18, 1991.

OPINIONS BELOW

The opinion of the 9th Circuit Court of Appeals is not published in the official reporters; the Court's opinion denying review is attached hereto in the Appendix. The related prior appeal, *Krain v. Smallwood, et al.*, is published at *Krain v. Smallwood et al.*, 880 F.2d 1119 (9th Cir. 1989).

JURISDICTION

On April 18, 1991, the 9th Circuit Court of Appeals affirmed consolidated appellate cases, Docket Nos. 90-55033, 55259, 55265, 55827, and 55977. This Court has jurisdiction under the 5th and 14th Amendments to the U.S. Constitution to review the decisions of the 9th Circuit under U.S. Supreme Court rules of procedure and U.S. Supreme Court Rule 12.2.

PERTINENT CONSTITUTIONAL PROVISIONS

Amendment XIV (equal protection clause)

Amendment XIV, Section 1:

> . . . no state shall . . . deprive any person of life, liberty, or property, without due process of law . . .

Amendment V (due process clause)

STATEMENT OF THE CASE

1. Nature Of The Case

In June 1987, petitioner filed a complaint in the United States District Court for the Central District of California, *Krain v. Smallwood, et al.*, CV 87-5387-JGD, which sought money damages, violation of his federal civil rights as a born Jew, libel and slander, invasion of privacy, intentional infliction of emotional distress, and other claims. A previous federal civil rights claim for 42 USC 1981, 1983, 1985, 1986 et al. violations was filed against Brent Sundin, et al. in June 1986 (CV 86-4289-LEW) with the additional allegation of battery and negligent retention. In January 1988, an additional civil rights and defamation action was filed against Jerry Hicks, et al. (CV 88-0244) and in August 1989, an additional complaint was filed against Ted Millard, et al. (CV 89-2512-WPG) alleging identical violations against additional defendants. All cases were assigned to judges as follows: Hicks, et al. to Consuelo Marshall; Millard, et al. to Judge William Gray;

Smallwood, et al. to Judge Davies; Sundin, et al. to Judge Laughlin Waters, who dismissed as follows:

Case	Date of Dismissal	Reason To Contest Dismissal
Hicks, et al.	May 1989	Conclusion of judge as to incompetent appellant, although no current competency report was obtained.
Millard, et al.	November 1989	No proof of service, although: a) Proof of service were on file; b) Defendants had made voluntary appearances; c) Federal Rules of Civil Procedure 4(g); d) No documented prejudice; e) There was documented evasion of service; f) Could not dismiss with prejudice if appellant was incompetent.
Smallwood, et al.	June 1989	Conclusion of judge as to incompetent appellant, although no current competency report was obtained.
Sundin, et al.	June 1989	Conclusion of judge as to incompetent appellant, although no current competency report was obtained.

The 9th Circuit Court of Appeals consolidated these four cases for ruling made April 18, 1991. This Petition is made within the 60 day time limit.

2. Allegations

Petitioner Krain was a prominent Jewish dermatologist in the Counties of Orange and Los Angeles and a distinguished author of medical publications, ethical member of medical and dermatology associations who was falsely arrested in 1981 for Medi-Cal and bribery allegations which were dismissed. However, in the process, Krain was beaten up by Medi-Cal investigators now dismissed from state service (*Krain v. Sundin, et al.*) and was harassed and had his medical practice destroyed by the outlandish tactics of the Jew-hating defendants in *Krain v. Sundin, et al.* who made anti-semitic diatribes to Krain's patients merely because of his physiognomy as a born Jew. They planted false newspaper stories attacking Krain before trial as a Jew in Orange County, and this led to the defamation and civil rights allegations in *Krain v. Hicks, et al.* Krain was illegally transferred from Brea Hospital in California to the twin hospital in Virginia and back, which in fact was an illegal federal investigation of Krain without Krain's consent and because he was a thorn in the side of right-wing types in Orange County, California. This led to the allegations in *Krain v. Millard, et al.* The first *Krain v. Smallwood et al.* case was remanded in the meantime by the 9th Circuit to the district court which ignored Krain's requests for a current competency determination as the decision required, and instead dismissed *Smallwood* and *Sundin* without prejudice, requiring a pro se litigant to refile these cases by whim of court and without any current opinion from a qualified mental health professional. Petitioner Krain is requesting review of the questions presented.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD REMAND TO THE 9TH CIRCUIT TO DETERMINE THAT PROOFS OF SERVICE WERE ON FILE FOR THE DISMISSED LITIGANTS OR A VOLUNTARY APPEARANCE WAS MADE AND CERTIFIED MAIL OR FEDERAL EXPRESS RECEIPTS WERE SUFFICIENT AND AN EVIDENTIARY HEARING SHOULD HAVE BEEN REQUIRED FOR DELIBERATE EVASION FOR SERVICE WAS SHOWN.

Factual and legal errors were made in the decision in Docket No. 90-55265, *Krain v. Millard, et al.* as dismissal for lack of proof of service was improper where:

1. Defendants had made voluntary appearances, *Murphy v. Travelers Insurance Company*, 534 F.2d 1155 (1976).

2. Federal Rules of Civil Procedure 4(g) provides that failure to make proof of service does not affect the validity of service and documentation of actual service was provided in appellant's briefs.

3. Certified mail service was sufficient, *United States v. Ayer*, 857 F.2d 881 (1988).

4. There was documented to be deliberate evasion of service where *Ruiz Varela v. Sanchez Veloz*, 814 F.2d 825 (1987) is controlling.

5. There was no documentation of prejudice to appellees; see *Pocahontas First Corporation v. Ventura Planning Group, Inc.*, 572 F.Supp. 503 (1983).

6. Proofs of service were filed in the lower court timely at Docket No. 52, but ignored by the lower court and the 9th Circuit.

Judicial notice is respectfully requested of these items under Federal Rules of Evidence 201.

II.

THIS COURT SHOULD RULE AS THE SECOND CIRCUIT, NOT THE NINTH CIRCUIT, DID THAT WHERE THERE IS EVASION OF SERVICE AND RETURN OF THE MAIL RECEIPT (UNACKNOWLEDGED) THAT THIS DOES NOT VOID SERVICE BY MAIL ACKNOWLEDGEMENT.

The 9th Circuit in *Worrell v. B.F. Goodrich Company*, 845 F.2d 840 (9th Cir. 1988) and the 8th Circuit in *Gulley v. Mayo Foundation*, 886 F.2d 161, 165 (8th Cir. 1989) have ruled that no mail service is accomplished where the mail receipt is not returned, but the 2nd Circuit in *Morse v. Elmire Country Club*, 752 F.2d 35, 39 had said a certified receipt without return acknowledgement is acceptable mail service, especially where there is evasion of service. *Ruiz Varela v. Sanchez Veloz, supra* and *Morse v. Elmire Country Club, supra* state that received but unacknowledged mail service is acceptable. The 1st Circuit in *United States v. Ayer, supra* says certified mail service is acceptable.

This Court is asked to clarify and secure uniformity of these five differing federal circuit mail service requirements for all federal litigants and also to indicate approval or disapproval in this modern age of Federal Express, UPS, or private carrier receipts as opposed to certified mail with its illegibility as opposed to the legibility of printed Federal Express receipts.

III.

THIS COURT SHOULD RESOLVE CONFLICTING FEDERAL CIRCUIT DECISIONS AND RULE THAT A LOWER COURT JUDGE'S DOUBT ABOUT COMPETENCE DOES NOT JUSTIFY DISMISSAL WITH OR WITHOUT PREJUDICE UNTIL SUCH TIME AS A QUALIFIED MENTAL HEALTH PROFESSIONAL CAN RENDER AN OPINION AS TO THE CURRENT NOT PAST COMPETENCY OF A LITIGANT.

Petitioner is an Illinois resident but sought relief in California federal courts. Both California Welfare and Institutions Code 5331 and Illinois Health and Welfare Code Chapter 8 *et seq.* state clearly that past incompetency determinations should have no bearing on present mental competence. In *Krain v. Hicks, et al., Smallwood, et al.*, and *Sundin, et al.*, both the lower court and the appellate court erred in dismissing Krain's cases because neither the lower court nor the appellate court can properly dismiss Krain's cases without prejudice on the basis of a doubt about Krain's competency where:

1. Krain was never given a competency hearing by a qualified mental health professional of recent date, but by a judge and magistrate without any mental health training, no medical degree, and no medical license as required by each and every case cited in the *Krain v. Smallwood, et al.* published decision.

2. Where at the same time the very same judges, Davies, Waters, and Gray, were making rulings in the 13 cases coordinated and consolidated before them, including these four (see *Krain v. Millard, et al.* docket sheet, docket item No. 40) as if Krain were competent. See, for example, orders in *Krain v. Kahn*, CV 90-305-LEW and *Krain v. Smith*, CV 88-5800-LEW and *Krain v. Ponath*, CV 89-1176-LEW.

> At least 13 other orders were issued in these cases as coordinated and consolidated by these judges.

Krain cannot be incompetent in four cases and competent in nine others during the same time frame and same coordinated/consolidated proceeding.

The appellate court has clearly failed to take notice of the related law in the nine other cases and has committed reversible error and should be ordered to void its previous decision and order a qualified mental health professional to examine Krain. Petitioner is a licensed physician in Illinois and ten other states who has current normal psychiatric evaluations. To attempt to dismiss these cases without a current competency determination is judicial error and a violation of Krain's 5th and 14th Amendment rights under the U.S. Constitution to due process and equal protection under the law. Krain's declarations at the lower and appellate court levels evidenced cooperation. Judicial notice of the above is requested under Federal Rules of Evidence 201.

This Court is requested to clarify its earlier decision in *Schlagenhauf v. Holder*, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964) which interprets Federal Rules of Civil Procedure 17(c) and 35(a) as to whether:

1. Good cause is required before such exam and what is good cause;

2. Whether the 9th Circuit decision in *Krain v. Smallwood, supra* established good cause and was in fact illegal since Petitioner had no current competency exam but was cooperative, but the Court never ordered one before dismissal despite Krain's cooperation.

The 9th Circuit differs from those of the 4th and 5th Circuits, *Cyntje v. Government of Virgin Islands*, 95 FRD

430 (DVI 1982 4th Cir.) and *Roberts v. Ohio Casualty Insurance Company*, 256 F.2d 35, 39 (5th Cir. 1958) which require a mental exam by a qualified mental health professional or appointment of an attorney. *Westcott v. United States Fidelity and Guaranty Company*, 158 F.2d 20, 22 (4th Cir. 1946).

Krain is being short circuited by a circuit Court of Appeals that blithely ignores Federal Rules of Civil Procedure 17(c) and 35(a). This Court is respectfully requested to interpret Krain's rights and establish uniformity for the conflicting circuit court interpretations.

CONCLUSION

Wherefore, Petitioner respectfully prays that this Honorable Court grant this Petition and issue a writ of certiorari to review the judgment of the United States Court of Appeals for the 9th Circuit.

Respectfully submitted,

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APPENDIX

[FILED APRIL 18, 1991]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAWRENCE S. KRAIN, M.D.,	)	
	)	Nos. 90-55033/55259
Plaintiff-Appellant,	)	
	)	D.C. # CV-88-0244-CBM
v.	)	
	)	
JERRY HICKS; TIMES MIRROR CORPORATION; TOM JOHNSON; COUNTY OF ORANGE; et al.,	)	
	)	
Defendants-Appellees.	)	

LAWRENCE S. KRAIN, M.D.,	)	
	)	No. 90-55265
Plaintiff-Appellant,	)	
	)	D.C. # CV-89-2512-WPG
v.	)	
	)	
TED MILLARD; TOM JOHNSON; ALFRED GOODWIN, Hon.; RONALD REAGAN; EDWARD WALLIN; RODERICK PONATH, et al.,	)	
	)	
Defendants-Appellees.	)	

LAWRENCE S. KRAIN, M.D., Plaintiff-Appellant, v. DONALD SMALLWOOD; LYNN WATERS; KATHLEEN O'LEARY; LUPE TORRES; MAURICE EVANS; CAROLYN ALBERTY; JOHN TROTTER; COUNTY OF ORANGE; KITTY LOVE; MARY LITTRELL; PAUL MAST, Esq.; ORANGE COUNTY MEDICAL ASSOCIATION; MARK WRAY, Defendants-Appellees.	No. 90-55827 D.C. # CV-87-5387-JGD ORDER

LAWRENCE S. KRAIN, Plaintiff-Appellant, v. BRENT SUNDIN; JAMES ALFANO; RICHARD BEACOM; ROBERT FITZGERALD; GERALD O'DONNELL; TIM MILLER; BRAD GATES, et al., Defendants-Appellees.	No. 90-55977 D.C. # CV-86-4289-LEW

Before: SCHROEDER and REINHARDT, Circuit Judges, and KING,* District Judge.

These matters are consolidated for purposes of disposition.

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* Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

[FILED APRIL 18, 1991]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAWRENCE S. KRAIN, M.D.,	)	
	)	Nos. 90-55033/55259
Plaintiff-Appellant,	)	
	)	D.C. # CV-88-0244-CBM
v.	)	
	)	
JERRY HICKS; TIMES MIRROR CORPORATION; TOM JOHNSON; COUNTY OF ORANGE; et al.,	)	
	)	
Defendants-Appellees.	)	

LAWRENCE S. KRAIN,	)	
	)	No. 90-55265
Plaintiff-Appellant,	)	
	)	D.C. # CV-89-2512-WPG
v.	)	
	)	
TED MILLARD; TOM JOHNSON; ALFRED GOODWIN, Hon.; RONALD REAGAN; EDWARD WALLIN; RODERICK PONATH, et al.,	)	
	)	
Defendants-Appellees.	)	

LAWRENCE S. KRAIN, M.D., Plaintiff-Appellant, v. DONALD SMALLWOOD; LYNN WATERS; KATHLEEN O'LEARY; LUPE TORRES; MAURICE EVANS; CAROLYN ALBERTY; JOHN TROTTER; COUNTY OF ORANGE; KITTY LOVE; MARY LITTRELL; PAUL MAST, Esq.; ORANGE COUNTY MEDICAL ASSOCIATION; MARK WRAY, Defendants-Appellees.	Nos. 90-55827 D.C. # CV-87-5387-JGD MEMORANDUM*

LAWRENCE S. KRAIN, M.D., Plaintiff-Appellant, v. BRENT SUNDIN; JAMES ALFANO; RICHARD BEACOM; ROBERT FITZGERALD; GERALD O'DONNELL; TIM MILLER; BRAD GATES, et al., Defendants-Appellees.	No. 90-55977 D.C. # CV-86-4289-LEW

* This deposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Appeal from the United States District Court
for the Central District of California
Consuelo B. Marshall, District Judge, Presiding
William P. Gray, District Judge, Presiding
John G. Davies, District Judge, Presiding
Laughlin E. Waters, District Judge, Presiding
Submitted April 2, 1991**
Pasadena, California

Before: SCHROEDER and REINHARDT, Circuit Judges, and KING,*** District Judge.

The judgments and orders of the district courts in the referenced cases are AFFIRMED.

In No. 90-55265, the dismissals were entered only as to named defendants as to whom there had been no proof of service notwithstanding plaintiff's having been given ample notice and time to provide it.

In No. 90-55827, the district court dismissed the complaint and the action without prejudice. In a prior appeal, we held this would be an appropriate resolution of this case. *Krain v. Smallwood,* 880 F.2d 1119 (9th Cir. 1989). The district court's action was taken only after ample notice to Krain and his having failed to comply with the orders of the court.

In No. 90-55977, the issues are the same as in No. 90-55827 except that the defendant-appellee is Brent Sundin instead of Smallwood.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); Circuit Rule 34-4.

*** Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

In Nos. 90-55033 and 90-55259, Krain appeals the dismissal of his action for failure to comply with the district court's order for a competency hearing and also appeals the competency order. The dismissal, which was without prejudice, and the competency order were proper. *Krain v. Smallwood, supra.*

AFFIRMED.